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Supreme Court, U.S.
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CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1985

BORG-WARNER LEASING, a division of Borg-Warner Acceptance Corporation, a Delaware Corporation,

Petitioner,

vs.

DOYLE ELECTRIC COMPANY, INC., a Florida corporation and P.H. DOYLE, JR.,

Respondent.

ON PETITION FOR CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Florida law mandates the waiver of an issue raised for the first time on a second appeal brought after a remand and trial.

2. Whether justifiable reliance is a necessary element of proof of fraudulent misrepresentation under Florida law.

LIST OF INTERESTED PARTIES

BORG-WARNER ACCEPTANCE CORPORATION
BORG-WARNER LEASING
DOYLE ELECTRIC COMPANY, INC.
P.H. DOYLE, JR.

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the United States District Court for the Middle District of Florida, William J. Castagna, J., are not reported. The Opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 733 F.2d 833 (App 3). The Jury Verdict and Final Judgment (App 4) of the United States District Court for the Middle District of Florida, William J. Castagna, J., of the case on remand are not reported.

The Petitioner's Motion For Judgment Non Obstante Veredicto (App 5) was denied by Order of the United States District Court for the Middle District of Florida (App 6).

The decision made by the Eleventh Circuit is cited at 767 F.2d 936 (5th Cir. 1985). The opinion is unpublished but appears herein at (App 7).

JURISDICTION

This petition seeks the discretionary jurisdiction of this Court pursuant to Rule 17 of the Supreme Court Rules of Appellate Procedure.

The Eleventh Circuit ruling below is in conflict with decisions by the Supreme Courts of Florida and Arizona and has reached a result which jeopardizes the sanctity of written contracts universally recognized under American jurisprudence.

STATEMENT OF THE CASE

Borg-Warner Leasing (hereinafter referred to as BW) filed a complaint in the Thirteenth Judicial Circuit in and for Hillsborough County, Florida against Doyle Electric Company, Inc. (hereinafter referred to as DE) and P.H. Doyle, Jr. (hereinafter referred to as Doyle) seeking damages pursuant to a lease agreement between BW and DE and seeking recourse under a Guarantee Agreement executed by Doyle. The Defendants DE and Doyle joined a third party defendant, Burroughs Corporation, which filed a Petition for Removal based upon diversity jurisdiction on May 28, 1981 (R 6). The third party complaint was dismissed as was Burroughs Corporation as a party to this action.

BW filed an amended complaint (R 86).

The Defendants filed an answer, affirmative defenses and a counterclaim (R 62-70). BW filed motions for summary judgment addressed to the Defendant's counterclaim and to its claims against the Defendants (R 140-164). The Defendants filed a counter motion for summary judgment (R 170-181).

On April 1, 1983 the District Court entered its Opinion and Order which granted BW's motion for summary judgment and denied Defendants' motion for summary judgment on its counterclaim (App 1; R 228-234). On May 19, 1983 the District Court entered a Final Summary Judgment in favor of BW (App 2; R 228-234).

An appeal was taken to the Eleventh Circuit Court of Appeals by DE and Doyle. The appeals court affirmed the summary judgment as to Count I of BW's complaint against DE as well as the trial court's disposition of the Defendants' counter-

claim. The appellate court reversed the summary judgment on Count II of BW's complaint and remanded it for trial (App 3; R 305-309).

On October 11, 1984 through October 12, 1984, issues of fact concerning Doyle's personal liability pursuant to a personal guarantee agreement were tried before a jury. BW moved for a directed verdict based upon Doyle's admission that he had never read the guarantee agreement (TR 1-63). BW argued that there could be no justifiable reliance upon any misrepresentation as a matter of law. The motion was denied and the jury entered a verdict for Doyle (App 4). BW moved for a judgment N.O.V. (App 5; R 381) which was denied and final judgment in favor of Doyle was entered on November 1, 1984 (App 6; R 390). BW appealed the decision to the Eleventh Circuit. The Eleventh Circuit

refused to consider the substantive issue on its merits and ruled that BW's point on appeal should have been raised in the previous appeal (App 7).

BW filed a petition for rehearing which was denied on September 23, 1985.

SUMMARY OF ARGUMENT

I. Doyle has thus far managed to escape liability under a personal guarantee agreement by asserting that he was fraudulently induced into executing the document by an agent of BW. Doyle admitted for the first time at the trial mandated by the Eleventh Circuit's reversal and remand of Count II of BW's complaint that he had never read the personal guarantee agreement which was being sued upon.

II. BW argued that the essential element of proof required in Doyle's defense, that of justifiable reliance, could not have been met as a matter of law if he did not even bother to read the guarantee agreement he signed. The trial court refused to accept this argument on BW's

motion for directed verdict but did instruct the jury that justifiable reliance must be present before a verdict can be entered for the Defendant.

III. The trial court's denial of the motion for directed verdict and of the motion for a judgment N.O.V. was raised on appeal to the Eleventh Circuit citing a case by the Arizona Supreme Court which was virtually identical to the factual situation raised on appeal to the Eleventh Circuit.

IV. The Eleventh Circuit failed to consider the case on its merits but rather ruled on the theory of the law of the case, i.e., that the issue raised by BW should have been raised in the first appeal. Florida law mandates that the law of the

case is only applicable to issues which have not been previously raised, but even more importantly, the issue which the Eleventh Circuit has ruled should have been raised was, in fact, not possible to raise as of the time of the first appeal.

V. The issue at stake is one of great import. The longstanding esteem in which English common law and American jurisprudence have held the sanctity of contracts will be seriously eroded if this case is not disposed of on its merits and in accordance with the authority set forth in Jones v. Chiado Corporation, 137 Ariz. 298, 670 P.2d 403, (Ariz. Ct. App. 1983).

ARGUMENT

I. THE LAW OF THE CASE UNDER FLORIDA DECISIONS:

The most current ruling by the Supreme Court of Florida on what constitutes the law of the case is found in U.S. Concrete Pipe Company vs. Bauld, 437 So.2d 1061 (Fla. 1983).

The Eleventh Circuit opined that the issue of justifiable reliance should have been raised in the first appeal. This is not consistent with the holding of U.S. Concrete Pipe Company, supra. This case establishes that under Florida law the law of the case is applicable only to those issues which were actually raised in the prior appeal.

Furthermore, it is in conflict with the

5th U.S. Circuit Court of Appeal decision in 1955 in Johnson v. Remy, 220 F.2d 73, 78 (5th Cir. 1955) holding that the Federal Court will follow the latest Florida Supreme Court ruling where decisions are in conflict, but do not purport to overrule each other.

II. THE ELEVENTH CIRCUIT MISAPPREHENDED THE STATE OF THE RECORD AT THE TIME THE FIRST APPEAL WAS BROUGHT.

In its second decision, the appellate court opined that the issue raised therein should have been raised in the first appeal. However, the record will show that the admission made by Mr. Doyle that he had never signed the document he claimed was misrepresented to him was not made until during the trial following the remand by

the circuit court in the first appeal. If that admission did not exist in the record prior to the first appeal, it was simply not possible for BW to raise the issue the first time around. The non-existence of evidence in the record on this point as of the first appeal lends wisdom to the appellate court's remand of Count II for trial, but in its second opinion, the court is saying that the facts that were adduced at the trial and issues raised during the course of the trial should all have been available prior to the motion for summary judgment prior to the first appeal. This ruling is not consistent with Florida law, sound logic or any precept of justice.

III. THE APPELLATE COURT HAS PROCE-

DURALLY AND ERRONEOUSLY BY-PASSED A SUBSTANTIVE ISSUE OF GREAT IMPORT.

Doyle defended against BW's claim brought upon a personal guarantee by alleging fraudulent misrepresentation. This affirmative defense, under Florida law, requires affirmative proof of four elements: (1) a misrepresentation of material facts; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and, (4) consequent injury by a party acting in reliance upon the representation.

The Supreme Court of Florida has dealt with the issue of reliance that is addressed in the fourth element most recently in Bessett vs. Basnett, 389 So.2d 995 (Fla. 1980). In that decision, the

court adopted the principles of law expressed in sections 540 and 541 of the Restatement (Second) of Torts, (1976).

Section 540 reads as follows:

> The recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation.

Section 541 reads as follows:

> The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false of its falsity is obvious to him.

The Bessett Court also adopted the comments to the above-quoted sections. Comment "a" to section 541 is particularly instructive in the context of the instant case. That comment reads:

> a. Although the recipient of a fraudulent misrepresentation is not barred from recovery because he could have discovered its falsity if he had shown his distrust of the maker's honesty by investigating its truth, he is nonetheless required to use his

> senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation. Thus, if one induces another to buy a horse by representing it to be sound, the purchaser cannot recover even though the horse has but one eye, if the horse is shown to the purchaser before he buys it and the slightest inspection would have disclosed the defect. On the other hand, the rule stated in this Section applies only when the recipient of the misrepresentation is capable of appreciating its falsity at the time by the use of his senses. Thus a defect that any experienced horseman would at once recognize at first glance may not be patent to a person who has had no experience with horses.

Thus, when the Bessett Court stated that a recipient of a misrepresentation may rely on the truth of it unless he "knew it was false or its falsity is obvious to him", it meant unless he could have discovered the falsity by the slightest "examination or investigation." Florida law clearly requires a misrepresentee to investigate or examine that which is right

in front of his face.

IV. DOYLE'S ACTIONS DO NOT LEGALLY JUSTIFY AN AVOIDANCE OF LIABILITY UNDER A WRITTEN CONTRACT.

During the course of the trial, Doyle admitted that he had the personal guarantee in front of him and could have read it but did not and instead relied upon what the alleged agent of BW had represented to him about its application, i.e. that it was solely prospective in application. When the pertinent language of the personal guarantee was read to Mr. Doyle at trial he admitted that the language of the personal guarantee agreement did not limit its application to being prospective only.

Consequently, at the close of Doyle's case, BW moved for directed verdict which

was denied by the trial judge. The jury was instructed that it must find the Defendant's reliance to have been justifiable. Nevertheless, the jury returned a verdict for the Defendant, and the Plaintiff moved for judgment notwithstanding the verdict which was denied by the trial court without opinion.

An appeal to the Eleventh Circuit followed. It relied primarily upon an Arizona Supreme Court decision with a factual scenario virtually identical to this case, and its application would have required an opposite result by the appellate court. Jones v. Chiado Corporation, 137 Ariz. 298, 670 P.2d 403, (1983). See also: Marshall v. Hartman, 139 So. 441 (Fla. 1932). The appellate court instead disposed of the BW appeal on a procedural basis which was also contrary to applicable

law as previously argued.

V. THE FAILURE OF THE APPELLATE COURT TO CONSIDER THE SUBSTANTIVE ISSUE IN THIS CASE ERODES THE LONG STANDING SANCTITY OF WRITTEN CONTRACTS IN AMERICAN JURISPRUDENCE

It has long been the law in the State of Florida as well as all other jurisdictions adopting the common law inherited from England that it is presumed that when one signs a contract he knows and understands its contents, terms and conditions. Sabin v. Lowes of Florida, Inc., 404 So.2d 772 (Fla. 5th D.C.A 1981).

In the instant case the jury obviously failed to apply the instruction it was given which read:

> "Fourth, the Defendant must prove that he justifiably relied and acted upon the misrepresentations. If, in the exercise of reasonable care of the pro-

> tection of his own interests, the Defendant could have ascertained the truth of the matter by making a reasonable inquiry or investigation under the circumstances presented, but failed to do so, then it cannot be said that he "justifiably" relied upon such misrepresentations."

The error was not corrected by the trial court and ignored by the appellate court. The result is that a party has managed to avoid being bound by a written contract merely by not having read it, a result clearly not sanctioned by the Supreme Court of Arizona which dealt with the issue on a substantive basis. The Arizona court reversed a jury verdict finding no basis in the record for justifiable reliance.

To the ultimate court of the land, it should be a matter of great concern that, as a result of a compounding of errors, a decision has been allowed to stand which erodes the sanctity of the written contract. If potential litigants are given an

cpportunity to avoid the obligation of a contract by merely denying that they have read it and then invoking parol evidence in an attempt to prove misrepresentation and inducement the court is then inviting a flood of litigation which, prior to the decision of the appellate court in this case, the law clearly did not intend to condone and which is clearly not in the best interest of an already strained legal system.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

All parties required to be served have been served by depositing on this 14th day of February, 1986, three printed copies of this document with the U.S. Post Office, addressed to counsel of record at his post office address.

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